

JOHN F. CORYEA
Claimant

COLLINS AVIONICS
Respondent

TRAVELERS INSURANCE
Insurance Carrier

Docket No. 140,698

Special Administrative Law Judge William F. Morrissey, in his March 3, 1994 Award, also found claimant's average weekly wage to be \$519.92. The parties did not object to this

finding, therefore the Appeals Board will calculate permanent partial general disability benefits based on this finding.

ISSUES

Special Administrative Law Judge William F. Morrissey, in his Award of March 3, 1994, assessed the Kansas Workers Compensation Fund one-hundred percent (100%) liability for all workers compensation benefits paid in the instant case. From that Award, the Kansas Workers Compensation Fund has requested the Appeals Board to review the following issues:

- (1) What is the nature and extent of claimant's disability?
- (2) Whether respondent is entitled to a K.S.A. 44-510a credit.
- (3) What is the liability of the Kansas Workers Compensation Fund, if any?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record and the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

(1) The claimant, John F. Coryea, while performing repetitive work activities with both upper extremities, between August 1989 and October 9, 1989, as an employee of the respondent, Collins Avionics, sustained accidental injuries to both of his shoulders and his neck. As a result of these accidental injuries, for reasons set forth below, the claimant has suffered a permanent partial general disability of seven and one-half percent (7.5%) based upon functional impairment.

At the Regular Hearing held on March 4, 1992, the claimant had been employed by the respondent as an instrument technician for thirteen (13) years. His job required him to lift instrument panels that weighed approximately twenty (20) pounds and to complete repetitive close tolerance work with miniature tools such as utilizing a manual screwdriver to turn approximately two-hundred (200) screws per day. At that time, the claimant was continuing to perform the job duties of an instrument technician for the respondent with accommodation allowing him to work at a slower pace earning the same wages as he earned prior to his latest work-related accidental injuries occurring between August 1989 and October 9, 1989.

Prior to the injuries that are the subject of this claim, the claimant had been off work and treated for bilateral carpal tunnel syndrome in 1988. The claimant's bilateral carpal tunnel syndrome was treated by Anthony G. A. Pollock, M.D., a board-certified orthopedic surgeon, who performed a right release on July 13, 1988 and a left release on September 27, 1988. After completing a work-hardening program, claimant finally returned to his regular work for the respondent in January 1989. Philip R. Mills, M.D., of Wichita Physical Medicine, P.A., examined and tested the claimant in June 1989. Nerve conductive studies were performed with normal median and ulnar nerve results. Dr. Mills opined that the claimant had a five percent (5%) permanent partial impairment to both wrists as a result of carpal tunnel syndrome.

Ernest R. Schlachter, M.D., examined and evaluated claimant, at the request of claimant's attorney, on August 1, 1989, concerning permanent partial impairment and

permanent restrictions as a result of claimant's work-related bilateral carpal tunnel syndrome. His diagnosis was overuse syndrome of both arms with carpal tunnel syndrome previously operated and with residual neuropathy. Dr. Schlachter was of the opinion that as a result of claimant's work-related injuries, claimant had a twenty-five percent (25%) permanent partial impairment of function of each arm. Claimant should do no repetitive pushing, pulling, twisting or grasping motion with either hand. Claimant should avoid lifting over fifteen (15) pounds with either arm, avoid use of vibratory tools and avoid cold environments. During this examination, claimant complained of symptomatology in both shoulders, but Dr. Schlachter specifically noted that the overuse syndrome of both shoulders was not taken into consideration when he formed his opinion on the claimant's permanent partial functional impairment rating as a result of the bilateral carpal tunnel injury.

On February 1, 1990, claimant settled his workers compensation claim for his bilateral carpal tunnel injury before David J. Wood, Special Administrative Law Judge, in Wichita, Kansas. The settlement record specifically acknowledges that the settlement did not cover the shoulder and neck problems filed in the instant case on November 6, 1989. The basis of the settlement was for a lump sum amount of \$20,000.00 to be paid to the claimant which represented an approximate eighteen percent (18%) permanent partial loss of use of both arms for injuries received each and every day through July 31, 1989. This was settled as two scheduled injuries, not as a body as a whole injury, pursuant to K.S.A. 1988 Supp. 44-510d(a)(23). Subsequent to this settlement, in 1992, the foregoing statute was declared unconstitutional by the Kansas Supreme Court in the case of Stephenson v. Sugar Creek Packing, 250 Kan. 768, 830 P.2d 41 (1992). Accordingly, bilateral repetitive use conditions occurring in the opposite upper extremities are calculated pursuant to K.S.A. 1988 Supp. 44-510e which provides for permanent partial general disability of the whole body based on functional impairment or work disability.

After the claimant returned to his regular job duties as an instrument technician in 1989, he began having minor pain and discomfort in his left shoulder in approximately July 1989. Such problems accelerated and also developed in his right shoulder and neck with subsequent headaches during August, September and the first part of October 1989. Claimant notified the respondent of these problems through his facility lead person and facility supervisor. His pain and discomfort culminated on October 9, 1989, when he had severe pain occurring across his shoulders and down the side of his neck. He sought medical treatment with his family physician, Dr. Terry Summerhouse, who took him off work as of October 9, 1989. Claimant notified respondent that he was being treated by Dr. Summerhouse for his continuing shoulder and neck problems with no objections from the respondent.

Dr. Summerhouse treated the claimant conservatively, prescribing pain medication, muscle relaxers, ultrasound, injections, and referred the claimant to various specialists for treatment and tests. During the next two years claimant was seen by Doctors Hassan, Lantis, Estivido, Fleming, Eyster, Pollock and Schlachter. A vocational rehabilitation assessment was ordered because claimant's permanent work restrictions would not allow him to return to work at that time. Finally, the respondent returned the claimant to his regular job on December 11, 1991, allowing him to work at a slow pace and to receive assistance when needed from other employees. The claimant was working earning the same wage as he was earning prior to his shoulder and neck injuries.

Dr. Schlachter again examined and evaluated the claimant on April 20, 1990 and April 29, 1991, this time for his shoulder and neck complaints. In his report dated April 29, 1991, Dr. Schlachter diagnosed overuse syndrome of the cervical spine and both shoulder

girdles with psychogenic overlay. Based mainly on subjective complaints, Dr. Schlachter's opinion as to the claimant's permanent partial impairment of function as a result of these injuries was fifteen percent (15%) to the body as a whole. Permanent restrictions were placed on the claimant of no repetitive pushing, pulling, twisting or grasping with either hand, no lifting over twenty-five (25) pounds with either hand, and the claimant should avoid vibratory tools and cold environments.

Dr. Anthony G. A. Pollock also testified in this case concerning claimant's shoulder and neck complaints. He first saw the claimant in reference to these complaints on December 5, 1989. The shoulder and neck complaints had previously been treated by Dr. Summerhouse, Dr. Mills, Dr. Watts and Dr. Eyster. At that time, Dr. Pollock opined that the claimant had a certain degree of neurosis concerning his hands and recommended both biofeedback and evaluation by a pain psychologist. The last time that Dr. Pollock had an opportunity to examine the claimant in reference to the shoulder and neck complaints was October 1990. Claimant continued to complain of pain in his shoulders and the base of his neck. After performing a physical examination, Dr. Pollock found no objective evidence to substantiate the complaints of the claimant. A TENS unit was recommended and Dr. Pollock thought the claimant could return to work with the use of such unit. Dr. Pollock was of the opinion that there is no organic pathology involved in the claimant's shoulder and neck complaints. Dr. Pollock also testified that no permanent functional impairment had resulted from the shoulder and neck complaints and no permanent restrictions were needed. However, on cross examination Dr. Pollock did testify that within a reasonable degree of medical probability the claimant, because of his previous carpal tunnel surgery, was more at risk to develop problems with his wrists, hands and arms than someone who never experienced carpal tunnel syndrome.

The claimant did not argue or did not present evidence to rebut the presumption of no work disability if the employee engages in work at a comparable wage. Consequently, the claimant's permanent partial general disability will be based on permanent functional impairment, if any. See K.S.A. 1988 Supp. 44-510e(a). The claimant agrees with the Special Administrative Law Judge's conclusion that he has sustained a fifteen percent (15%) permanent partial general disability based on the functional impairment rating of Dr. Schlachter.

The Kansas Workers Compensation Fund and the respondent argue that the most persuasive and credible medical evidence in this case is the opinion of Dr. Pollock, the only treating physician to testify. Based on Dr. Pollock's opinion, there is no objective evidence to substantiate claimant's complaints and no organic pathology involvement. Therefore, no permanent functional impairment or permanent restrictions resulted from claimant's shoulders and neck complaints.

The Special Administrative Law Judge, in awarding the claimant a fifteen percent (15%) permanent partial general disability based on Dr. Schlachter's opinion, reasoned that Dr. Schlachter's opinion was the most credible because he found no reason in the record to disbelieve the claimant's subjective complaints. However, after reviewing the whole record, the Appeals Board finds no reason not to consider Dr. Pollock's opinion when arriving at functional impairment. As the trier of fact, the Appeals Board has the right and obligation to weigh the evidence to determine the credibility of the witnesses, including the physician who testified, in making its decision on the disability of the claimant. See Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 784-785, 817 P.2d 212, rev. denied 249 Kan. 778 (1991). Accordingly, the Appeals Board concludes that Dr. Pollock's opinion that the claimant has no functional impairment should be weighed equally with Dr. Schlachter's

fifteen percent (15%) opinion entitling the claimant to a seven and one-half percent (7.5%) permanent partial general disability based upon functional impairment.

(2) Both the Kansas Workers Compensation Fund and the respondent contend that a K.S.A. 44-510a credit is applicable because of claimant's previous bilateral carpal tunnel injury. K.S.A. 44-510a provides that when an employee has previously received compensation and then suffers a later injury, compensation payable for the later injury shall be reduced by the percentage the prior disability contributed to the overall disability following the later injury. The purpose of the statute is to avoid pyramiding of consecutive disabilities. See Brozek v. Lincoln County Highway Dept., 10 Kan. App. 2d 319, 326, 698 P.2d 392 (1985); Spencer v. Daniel Constr. Co., 4 Kan. App. 2d 613, 621, 609 P.2d 687; rev. denied 228 Kan. 807 (1980). In this case, however, the prior injury was to a different part of the body and the current award does not include the prior disability. The prior disability did not, therefore, contribute to the overall disability following the later injury, no pyramiding is involved, and the statute does not apply.

(3) As to the liability, if any, of the Kansas Workers Compensation Fund, the Appeals Board affirms the Special Administrative Law Judge's finding that the Kansas Workers Compensation Fund should be one-hundred percent (100%) liable for all workers compensation benefits paid in reference to the claimant's shoulders and neck injuries.

As evidenced by the settlement contained in the record concerning the claimant's bilateral carpal tunnel syndrome, the respondent knowingly retained a handicapped employee with a pre-existing impairment. K.S.A. 44-567(a)(1)(2),(b). Dr. Schlachter testified that the claimant compensated for his pre-existing hand and wrist problems by overusing his shoulders. Dr. Schlachter opined that the claimant would not have developed overuse syndrome of the shoulders and neck but for his pre-existing bilateral carpal tunnel syndrome. Even Dr. Pollock, on cross examination, testified that the claimant was more at risk to develop additional problems because of the carpal tunnel syndrome. The Appeals Board therefore finds that the record in this case establishes that the claimant's shoulders and neck injuries would not have occurred but for the claimant's pre-existing bilateral carpal tunnel syndrome.

All other findings of Special Administrative Law Judge William F. Morrissey, in his Award dated March 3, 1994, are incorporated herein and are made a part hereof as if specifically set forth in this Order to the extent that they are not inconsistent with the findings and conclusions expressed in this Order.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated March 3, 1994, is hereby modified and an award is entered as follows:

AN AWARD OF COMPENSATION IS HEREBY ENTERED IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, John F. Coryea, and against the respondent, Collins Avionics, and its insurance carrier, Travelers Insurance, for an accidental injury sustained on October 9, 1989, and based on an average weekly wage of \$519.92.

Claimant is entitled to 47.29 weeks of temporary total disability compensation at the rate of \$271.00 per week or \$12,815.59, followed by payment of \$26.00 per week for

367.71 weeks or \$9,560.46, for a seven and one-half percent (7.5%) permanent partial general disability, making a total award of \$22,376.05.

As of November 18, 1994, there is due and owing the claimant 47.29 weeks of temporary total disability compensation at the rate of \$271.00 per week or \$12,815.59, plus 219.28 weeks permanent partial general disability at \$26.00 per week in the sum of \$5,701.28, for a total due and owing of \$18,516.87, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$3,859.18 shall be paid at the rate of \$26.00 per week for 148.43 weeks until fully paid or further order of the Director of Workers Compensation.

The Kansas Workers Compensation Fund is hereby ordered to reimburse the respondent for one-hundred percent (100%) of all compensation, medical expenses, and costs incurred in this particular claim.

The respondent is not entitled to a K.S.A. 44-510a credit according to the facts of this case.

IT IS SO ORDERED.

Dated this ____ day of November, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Wichita, Kansas
William R. Tretbar, Wichita, Kansas
Steven L. Foulston, Wichita, Kansas
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director